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IN THE

Supreme Court of the United States

October Term, 1972

No. ~~72361~~ 72-361

In the Matter of

The Application of STEPHEN S. GOTTLIEB,
Petitioner,

against

PERRY B. DURYEA, JR., as Speaker of the Assembly of the State of New York; DONALD A. CAMPBELL, individually and as Clerk of the Assembly of the State of New York; and FRED F. TAYLOR, individually and as Superintendent of Mailing for the Assembly of the State of New York,

Respondents.

BRIEF IN OPPOSITION TO PETITION

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BRIEF IN OPPOSITION TO PETITION

This litigation began as a proceeding to review and enjoin alleged discriminatory practices of the New York Assembly. The petition averred, *inter alia*, that the respondents refused to mail copies of a letter addressed by then Assemblyman Stephen S. Gottlieb to some of his constituents upon the ground that such letters were too political to be mailed at public expense. Petitioner Gottlieb has ceased to be an Assemblyman since commencement of the proceeding and is presently a Commissioner of the New York State Liquor Authority.

Upon appeal to the New York State Appellate Division, Third Judicial Department, that Court dismissed the petition stating in 38 AD 2d 634, at 635, as follows:

"The fundamental constitutional principle of the separation of powers among the three departments of government is included by implication in the pattern of government adopted by the State of New York (*Matter of LaGuardia* v. *Smith*, 288 NY 1, 5-6), it being a basic part of the organic law that each department should be free from interference, in the discharge of its own functions and peculiar duties, by either of the others (*Matter of Davies*, 168 NY 89, 101-102; *People ex rel. Burby* v. *Howland*, 155 NY 270, 282). The grievance alleged in the first cause of the petition is an internal matter to be handled within the procedures of the Legislature. The courts should not review every internal dispute between its members since, to do so, would frustrate the legislative process and violate said constitutional principle. This is not a case of an overriding constitutional question, as in *Powell* v. *McCormack* (395 US 486) and *Bond* v. *Floyd* (385 US 116), wherein the internal administration of a legislative body was not in issue. We do not view this as a case of prior restraint or infringement of free speech since petitioner Gottlieb was free to use the mails, the question here being, rather, whether he could, under the legislative framework, expend public money for said purpose (see Legislative Law, § 16). Under the facts of this case, the first cause of action as set forth in the petition should be dismissed."

The New York Court of Appeals unanimously affirmed, without opinion, on June 1, 1972. A motion by Petitioner to amend the remittitur to reflect that a Constitutional question was presented and necessarily decided was denied on July 7, 1972.

The decision of the Appellate Division and the affirmance thereof by the Court of Appeals are properly predicated upon the doctrine of the separation of powers among the three coordinate branches of government and the Courts' reluctance to interfere with the internal affairs of the legislative branch, a question relating solely to New York State law.

This petition should be denied upon the authority of *Doremus* v. *Board of Education*, 342 U. S. 429 (1952). The Petitioner is no longer a legislator of the State of New York. The matter is, therefore, moot. Moreover, no direct injury to the Petitioner can be demonstrated, in view of his changed circumstances. He is, consequently, seeking an advisory opinion from this Court, long since settled as being beyond the scope of a *bona fide* case or controversy. *Flast* v. *Cohen*, 392 U. S. 83, 95 (1967); *Sierra Club* v. *Morton*, 405 U. S. 727 (1972).

Further, denial of the petition is mandated by *Herb* v. *Pitcairn*, 324 U. S. 113 (1944) and *Department of Mental Hygiene* v. *Kirchner*, 380 U. S. 194 (1965). The decision of the Appellate Division in 38 AD 2d 634, 635, quoted *supra*, rested expressly upon adequate and independent State grounds. The refusal by the New York Court of Appeals to amend the remittitur as requested by Petitioner is a reiteration by it of the lack of any Federal Constitutional question. In short, the entire matter is undoubtedly a question of New York State law.

The Petition for Certiorari Should be Denied

Dated: September 27, 1972.

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